



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

February 10, 2021

Gary Winuk
Kaufman Legal Group
621 Capitol Mall, Suite 1900
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-21-013

Dear Mr. Winuk:

This letter responds to your request for advice regarding Government Code Section 1090, et seq.¹ Please note that we are only providing advice under Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including Public Contract Code.

Also, note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General's Office and the Los Angeles County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice "is not admissible in a criminal proceeding against any individual other than the requestor." (See Section 1097.1(c)(5).)

QUESTION

Does Section 1090 prohibit the Los Angeles Homeless Services Authority ("LAHSA") from entering a contract with the Inner City Law Center ("Center"), where the Center's Chief Operating Officer is the spouse of LAHSA's Executive Director?²

¹ All statutory references are to the Government Code, unless otherwise indicated.

² For convenience, we consolidated your Questions 1 through 5 as they all pertain to LAHSA's ability to enter into a future contract, or extend the current contract, with the Center.

CONCLUSION

No. So long as LAHSA's Executive Director abstains from any participation in the making of a contract, including extension of the current contract, between LAHSA and the Center, LAHSA will not be prohibited under Section 1090 from entering such contract.

FACTS AS PRESENTED BY REQUESTER

You represent Heidi Marston, the Executive Director of the Los Angeles Homeless Services Authority ("LAHSA"). LAHSA was created in 1993 as an independent joint powers authority between the Los Angeles County Board of Supervisors and the City of Los Angeles, to coordinate and manage a budget of over \$400 million annually in federal, state, county and city funds for programs that provide shelter, housing and services to people experiencing homelessness. LAHSA is governed by a 10-member Commission – five of whom are appointed by the Los Angeles County Board of Supervisors and five of whom are selected by the Mayor and the Los Angeles City Council.

Ms. Marston was hired by LAHSA as Chief Program Officer on February 25, 2019. On January 1, 2020, she assumed the position of Executive Director. Her spouse, Ian Musa, is the Chief Operating Officer of the Inner City Law Center ("Center"), a 501(c)(3) non-profit corporation. His employment with the Center began on February 24, 2020.

The Center currently has a multi-million-dollar contract with LAHSA to provide legal services to individuals experiencing homelessness and to individuals and families seeking to prevent homelessness from occurring. The contract was awarded in January of 2018, and originally was set to expire on June 30, 2020. In October of 2019, before Ms. Marston became LAHSA's Executive Director and before her spouse interviewed with or joined the management of the Center, LAHSA staff proposed, and the Board approved, a structural change to LAHSA's procurement cycle such that then-current programmatic contracts would be extended while the new procurement system was developed.

LAHSA staff extended the Center's contract to June 30, 2021, without Ms. Marston's participation. LAHSA's Commission gave blanket approval to the extension of LAHSA's contract with the Center along with all contracts receiving County homelessness program funding. Under a system that was put in place when Ms. Marston became Executive Director, responsibility for executing the contract extension and for administering the contract has been delegated to LAHSA's COO – or, in her absence, the Executive Management Officer – to avoid any involvement on the part of Ms. Marston.

Following the adoption of a new protocol for issuing RFP's, LAHSA will prepare and release an RFP for organizations interested in contracting with LAHSA to provide the legal services currently provided by the Center. That RFP will be issued some time in 2021. Under LAHSA's usual procedures, LAHSA staff is responsible for drafting RFP language, and the Commission approves issuance of the final RFP. After responses to the RFP are received, LAHSA staff scores the responses and makes a recommendation to the Commission, which ultimately has authority for approving all contracts in excess of \$500,000.

In this case, LAHSA has a process in place to remove Ms. Marston from any involvement in the RFP process involving the legal services contract. Ms. Marston will not be involved in developing or implementing the RFP, the LAHSA Commission will determine the recipient of the contract award, and responsibility for executing and administering the contract has been delegated to the organization's COO (or the Executive Management Officer). Should the expiration date of any of the current contracts that were already extended – including LAHSA's contract with the Center – come due before a new contract is awarded, it is anticipated that LAHSA would again extend those contracts. In that event, the decision to extend the Center's contract would be left again entirely to staff other than Ms. Marston, and the Commission would approve the extension under the existing protocol that has been in place since Ms. Marston assumed her current position.

ANALYSIS

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest." (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.)

Here, the primary issue is whether Ms. Marston, as the Executive Director of LAHSA, can avoid a Section 1090 violation by abstaining from virtually every aspect of the making, implementation and administration of a future contract³ between LAHSA and the Center, where her spouse is the Chief Operating Officer.⁴

Initially, we note that when Section 1090 applies to a member of a governing body of a public entity, the prohibition generally cannot be avoided by having the interested board member abstain from the decision. Rather, the entire governing body is precluded from entering the contract. (*Thomson, supra*, at pp. 647-649.) Conversely, when an employee is financially interested in a contract, as here, the employee's agency is prohibited from making the contract by Section 1090 only if the employee was involved in the contract-making process. Therefore, if the employee plays no role whatsoever in the contracting process (either because such participation is outside the scope of the employee's duties or because the employee disqualifies himself or herself from all such participation), the employee's agency is not prohibited from contracting with the employee or the business entity in which the employee is interested. (See 80 Ops.Cal.Atty.Gen. 41 (1997).)⁵

³ A decision to modify, extend, or renegotiate a contract constitutes involvement in the making of a contract under section 1090. (See, e.g., *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191 [exercising a renewal option and adjusting the payment rates is making a contract within the meaning of Section 1090].)

⁴ An official has an interest in the community and separate property income of his or her spouse. (*Nielsen v. Richards* (1925) 75 Cal.App. 680; *Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655; 89 Ops.Cal.Atty.Gen. 69 (2006).) Therefore, Ms. Marston would be financially interested in any contract between LAHSA and the Center.

⁵ We note that under the remote interest exception in Section 1091(b)(1), a member of a body or board has only a remote interest in contracts between the member's agency and the nonprofit organization where the member is an

Section 1090 casts a wide net to capture those officials who participate in any way in the making of the contract. (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) Therefore, for purposes of Section 1090, participating in making a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing plans and specifications, and solicitations for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237.) The court in *Sobel, supra*, noted that participation may include actions to influence the process as well:

The decisional law, therefore, has not interpreted section 1090 in a hypertechnical manner, but holds that an official (or a public employee) may be convicted of violation no matter whether he actually participated personally in the execution of the questioned contract, if it is established that he had the opportunity to, and did, influence execution directly or indirectly to promote his personal interests.

(*Sobel, supra*, at p. 1052.)

According to the facts, LAHSA entered into a contract with the Center in January of 2018, predating both Ms. Marston's employment with LAHSA and her spouse's employment with the Center. LAHSA staff then recently extended the Center's contract without Ms. Marston's participation. Under a system that was put in place when Ms. Marston became Executive Director, contract extensions and administration concerning the Center will be performed by LAHSA's COO, or the Executive Management Officer in her absence, without any participation from Ms. Marston.

In addition, LAHSA plans to issue an RFP for legal services currently provided by the Center at some point in 2021. Ms. Marston will not be involved in developing or implementing the RFP, the LAHSA Commission will determine the recipient of the contract award, and responsibility for executing and administering the contract has been delegated to LAHSA's COO or Executive Management Officer. In other words, Ms. Marston will not participate in any aspect of making or administering the future legal services contract.

Accordingly, so long as Ms. Marston abstains from any participation in the making of a contract, including extension of the current contract, between LAHSA and the Center, the conflict of interest provisions of Section 1090 will not prohibit LAHSA from entering such contract.

officer or employee. Thus, if Ms. Marston were a member of LAHSA's 10-member Commission, she would have only a remote interest in contracts between LAHSA and the Center, and such contracts would be permitted so long as she abstained from any participation in making those contracts. The conclusion that Ms. Marston's abstention, as an employee of LAHSA, avoids a Section 1090 violation is thus consistent with the remote interest exception under Section 1091(b)(1), which only applies to members of a body or board.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel

By: *Jack Woodside*
Jack Woodside
Counsel, Legal Division

JW:aja